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IN THE

Supreme Court of the United States

October Term, 1967
No. 1305

VILIS MARTINS LAPENIEKS,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

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ARGUMENT.

The operative language of Section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a) provides that ". . . any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces . . . of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service *on such ground* shall be permanently ineligible to become a citizen of the United States." (Emphasis supplied.)

In its brief, Respondent argues that Petitioner's reliance on *United States v. Hoellger,* 273 F. 2d 760 (C.A. 2), *Cannon v. United States,* 288 F. 2d 269 (C.A. 2), *In re Rego's Petition,* 289 F. 2d 174 (C.A. 3), and *United States v. Lacher,* 299 F. 2d 919 (C.A. 9), is misplaced because *Hoellger, Cannon, Rego* and

Lacher all served in the Armed Forces. Petitioner does not rely on these cases as setting forth the principle that one in the Petitioner's position, that is, one who is first granted an exemption which is subsequently withdrawn and who is then found to be ineligible to serve by reason of physical disability should be eligible for citizenship. Petitioner does, however, submit that these cases imply that the exemption from military service on the ground of alienage must be permanent in order for a bar to citizenship to exist.

The plain fact is that *Hoellger, Cannon, Rego* and *Lacher,* like Lapenieks, all applied for and received exemption based on alienage. If the mere granting of such exemption is sufficient to constitute a bar, then neither *Hoellger, Cannon, Rego* nor *Lacher* should have received citizenship. There is no logical way to distinguish this case from *Hoellger, Cannon, Rego* or *Lacher* in terms of the language of the statute, to-wit: that the relief be "on such ground"—alienage. As Judge Duniway noted in his Dissent in the instant case, Lapenieks' "relief from service on the ground that he was an alien was just as completely terminated when he was reclassified 1-A as was the relief granted to Lacher, Rego, Cannon and Hoellger 'on such ground' when each of them was thus reclassified. The relief later granted to, or thrust upon, Lapenieks as IV-F was not 'on the ground that he [was] an alien.'" 389 F. 2d 343 at 347 (C.A. 9).

Respondent makes much of the possibility that Petitioner's disability might possibly have developed between the time he was exempted and the time he was subsequently called for service, and apparently would tack the exemption from military service based on dis-

ability to the exemption based on alienage. Yet the statute is very plain. It states that the exemption must be "on such ground," *i.e.*, alienage. In any case, it is not easy to answer Respondent's supposition, because the condition which led to Petitioner's being considered physically disabled is peculiarly within the knowledge of Respondent and has not been disclosed to Petitioner even at this time. Moreover, it would have been a relatively simple matter for Respondent in 1952 to have granted Petitioner his exemption, but nonetheless to have insisted on a physical examination at that time. This the Respondent did not choose to do.

It is respectfully suggested that an orderly and uniform rule does not exist simply because cases like *Hoellger, Cannon, Rego* and *Lacher* are decided one way and cases like that of this Petitioner's another. There is nothing to distinguish Hoellger from this Petitioner within the language of the statute. Service in the Armed Forces is not the criterion of eligibility under the statute, but exemption based on alienage.

Since forwarding the Petition in this matter to the Supreme Court, Petitioner has been advised by letter of the pendency of two other cases which may be affected by the decision in this case. Copies of said letters are set forth in Appendix A to this Reply Brief.

Conclusion.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be granted.

ROBERT D. HORNBAKER,
EDGAR F. GROSS,
ROBERT A. EISENSTEIN,
Attorneys for Petitioner.

May 1968.

APPENDIX A.

America Civil Liberties Union
of Northern California
[Letterhead]

April 9, 1968

Gross & Eisenstein
Attorneys at Law
10889 Wilshire Boulevard
Los Angeles, California 90024

Re: Lapenicks v. Immigration &
Naturalization Service,
9th Cir., Jan. 11, 1968

Gentlemen:

We have determined from records on file with the Ninth Circuit in the above case that you intend to bring the matter to the United States Supreme Court on certiorari. It may be helpful for your petition to incorporate the fact that there is another case involving almost identical facts pending in the United States District Court for the Northern District of California. This involves Mr. Ib Otto Astrup as to whom the Immigration & Naturalization Service has recommended denial of naturalization in Petition No. 168753 following the Lapenicks majority.

Although I have not yet read the cases of *United States v. Lacher*, 299 F.2d 919, and *United States v. Hoellger*, 273 F.2d 760, it seems to me that our respective clients are being denied the benefits of these cases solely because they were physically unfit. This

seems to me to be an arbitrary reason for denial of citizenship, especially where, as in our case, the applicant was willing to go into the service had he been fit.

If I can furnish any further information about the *Astrup* case I will be glad to be of service.

Sincerely yours,

/s/Marshall W. Krause
Marshall W. Krause
Staff Counsel

MWK:sd

cc: Ernest Besig
Executive Director

Jackson & Hertogs
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April 9, 1968

Z. B. Jackson
Joseph S. Hertogs
Allen R. Jackson

Mr. Edward F. Gross
Attorney at Law
10889 Wilshire Boulevard
Los Angeles, California 90024

Dear Mr. Gross:

In re: *Petition of Lapenieks*

Have you filed, or do you intend to file a petition for writ of certiorari from the adverse decision of the Court of Appeals for the Ninth Circuit in the above case?

I have a case involving the same issues which is set for argument in the District Court here on April 24, 1968.

Sincerely yours,

/s/ Joseph S. Hertogs

JSH:gw